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# Addressing an Alien's Fears of Torture under the Convention against Torture

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# Addressing an Alien's Fears of Torture under the Convention against Torture

## **Cover Page Footnote**

International Law; Commercial Law; Law

# Addressing an Alien's Fears of Torture Under the Convention Against Torture

Jansen Averett†

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## I. Introduction

The political situation in Iran in the late 2000s was characterized by unrest. A volatile presidential election in June 2009 resulted in massive protests and a government crackdown that successfully ended the protests but failed to put an end to the

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“simmering discontent” throughout the country.<sup>1</sup> The use of rape and torture in some Iranian prisons still exists.<sup>2</sup> Furthermore, the most recently published U.S. State Department report on Iran states that Iranians who are returning from another country “are subject to searches and extensive questioning for evidence of anti-government activities abroad.”<sup>3</sup> Mohammad Ghaziaskar is a native of Iran who has been living in the United States since 1974, when he came to the country as a student.<sup>4</sup> Ghaziaskar is now facing deportation, but he claims that he faces threats of torture and persecution if forced to return to his home country due to his involvement in potentially adverse religious and political acts.<sup>5</sup>

This Note will explore the facts and reasoning for the Third Circuit Court of Appeals’ holding in *Ghaziaskar v. Attorney General*<sup>6</sup> in Part II. Part III will summarize and explain the background law relating to this case, and Part IV will provide an

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<sup>1</sup> See Michael Slackman, *Tehran Plans to Execute 3 Protesters of Election*, N.Y. TIMES, Oct. 11, 2009, at A20, available at

[http://www.nytimes.com/2009/10/11/world/middleeast/11iran.html?\\_r=2](http://www.nytimes.com/2009/10/11/world/middleeast/11iran.html?_r=2). As of this writing, thousands have begun protesting in Iran in solidarity with the protesters in Egypt. The 2011 protests in Iran are beyond the scope of this note. For more information, see, e.g., Scott Peterson, *Iran opposition returns to streets, energized by Egypt*, CHRISTIAN SCI. MONITOR, Feb. 14, 2011, <http://www.csmonitor.com/World/Middle-East/2011/0214/Iran-opposition-returns-to-streets-energized-by-Egypt>.

<sup>2</sup> See, e.g., Martin Fletcher, *‘Torture, Murder and Rape’ – Iran’s Way of Breaking the Opposition*, TIMES (LONDON), Sept. 18, 2009, at 42, available at [http://www.timesonline.co.uk/tol/news/world/middle\\_east/article6839335.ece](http://www.timesonline.co.uk/tol/news/world/middle_east/article6839335.ece). A student was arrested in Tehran for protesting the disputed re-election of Mahmoud Ahmadinejad. Security forces beat the student so badly that he was put in the hospital before being taken to prison. He later died. *Id.*

<sup>3</sup> Shannon P. Duffy, *Citing Torture Concerns, 3rd Circuit Blocks Deportation to Iran, for Now*, THE LEGAL INTELLIGENCER (Sept. 8, 2009), <http://www.law.com/jsp/law/international/LawArticleIntl.jsp?id=1202433622659>.

<sup>4</sup> *Ghaziaskar v. Ashcroft*, No. Civ. 3CV041520, 2005 WL 1138377, at \*1 (M.D. Pa. Apr. 27, 2005).

<sup>5</sup> See *Ghaziaskar v. Attorney Gen. for the U.S.*, 343 F. App’x 762, 763 (3d Cir. 2009) (showing that Ghaziaskar believes his activities could be potentially adverse in the eyes of the Iranian government).

<sup>6</sup> *Id.* There are two cases cited in this Note that begin with the name Ghaziaskar. To eliminate confusion, all references to the main case at hand, *Ghaziaskar v. Attorney Gen. for the U.S.* 343 F. App’x 762, 763 (3d Cir. 2009), will refer to the case simply as “*Ghaziaskar*.” References to *Ghaziaskar v. Ashcroft*, No. Civ. 3CV041520, 2005 WL 1138377 (M.D. Pa. Apr. 27, 2005), will include the entire name of the case.

analysis of the impact of *Ghaziaskar* on international law as applied to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>7</sup> (“the Convention”). In Part V, this Note will conclude that in removal proceedings involving claims under the Convention, courts should follow the lead of *Ghaziaskar* and consider more seriously the threat of torture and human rights violations in light of the current political climate and conditions in Iran.

*A. Political History: 1979 Iranian Revolution*

In order to better understand Ghaziaskar’s case, it is helpful to have a basic knowledge of current conditions in the country and Iran’s political history, specifically the Iranian Revolution that occurred in 1979. At the time of the Revolution, the United States was an ally to the Shah, Mohammed Reza Pahlavi, who ruled the country from 1941 until 1979.<sup>8</sup> Opposition to the regime of Mohammad Reza Shah Pahlavi began to grow because of the Shah’s efforts to modernize the country and make Iran more pro-Western.<sup>9</sup> The Ayatollah Ruhollah Khomeini was an active opponent and was exiled by the Shah in 1964.<sup>10</sup> The Shah’s regime finally collapsed in 1979 due to the combination of “mass demonstrations and guerrilla activity by pro-Khomeini forces,” as well as other activities by anti-Shah activists.<sup>11</sup> Khomeini then returned from exile, took over the country, and declared Iran an Islamic Republic.<sup>12</sup> Khomeini was “strongly anti-West and particularly anti-U.S.,” and relations between the two countries rapidly deteriorated.<sup>13</sup> This anti-Western sentiment culminated in the 1979 hostage situation, during which American hostages were

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<sup>7</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85 [hereinafter *Convention Against Torture*].

<sup>8</sup> KENNETH KATZMAN, CONG. RESEARCH SERV., RL 32048, IRAN: U.S. CONCERNS AND POLICY RESPONSES 1 (2009).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 2.

<sup>13</sup> KENNETH KATZMAN, CONG. RESEARCH SERV., RL 32048, IRAN: U.S. CONCERNS AND POLICY RESPONSES 1 (2009).

seized at the U.S. Embassy by pro-Khomeini radicals.<sup>14</sup>

*B. Social Upheaval: 2009 Iranian Election*

The regime that the Ayatollah Khomeini established, based on the Constitution of the Islamic Republic of Iran, has remained relatively stable over the years.<sup>15</sup> However, the country still faces periods of unrest, as evidenced by the June 2009 election.<sup>16</sup> President Mahmoud Ahmadinejad was declared the winner of the 2009 election, though this result has been heavily disputed with many claiming fraud and calling for a new election.<sup>17</sup> The Ahmadinejad regime began to crack down on protesters, many of whom were beaten by security forces.<sup>18</sup> According to a 2005 U.S. State Department report on Iran, security forces and prison personnel continue to use torture, and some prisons were “notorious for the cruel and prolonged acts of torture inflicted upon political opponents.”<sup>19</sup> In addition, recent human rights reports released in 2009, show that Iran continues to have “widespread” serious abuses, including unjust executions, politically motivated abductions by security forces, torture, arbitrary arrest and detention, and arrests of women’s rights activists.<sup>20</sup> Iran’s long-standing human rights violations are still far from over.<sup>21</sup>

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 7 (discussing the June 2009 election between Mahmoud Ahmadinejad, Mir Hossein Musavi, Mehdi Karrubi, and Mohsen Reza’i). See Peterson, *supra* note 1.

<sup>17</sup> KATZMAN, *supra* note 8, at 8.

<sup>18</sup> *Id.*

<sup>19</sup> 2004 Country Reports on Human Rights Practices: Iran, U.S. DEPARTMENT OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR (Feb. 28, 2005), <http://www.state.gov/g/drl/rls/hrrpt/2004/41721.htm>.

<sup>20</sup> KATZMAN, *supra* note 8, at 11 (discussing the results of recent reports by the United States Department of State and the United Nations Secretary General). Additional details about human rights practices in Iran are provided in Table 4 of the Congressional Research Service report. *Id.* at 11-12. The report notes that in every year since 1999, Iran has been named as a “Country of Particular Concern” with regard to religious freedom. *Id.* at 12. Since the report was released, religious freedom in Iran has deteriorated further. See Editorial, *What is Moderate Islam?*, WALL ST. J., Sept. 1, 2010, at A17.

<sup>21</sup> See, e.g., Fletcher, *supra* note 2.

*C. Effect of Criminal Conviction on Withholding and Deferral of Removal under the Convention*

Ghaziaskar's case is unusual because he is an alien facing deportation who has also been convicted of a crime.<sup>22</sup> Criminal convictions matter in deportation proceedings because some crimes can disqualify an alien for withholding of removal.<sup>23</sup> This Note will not focus on the criminal conviction for drug trafficking, but it is necessary to explain why Ghaziaskar is not eligible for *withholding* of removal, but is eligible for *deferral* of removal. Under the Immigration and Nationality Act of 1952<sup>24</sup> ("INA"), an alien who has been convicted of a "particularly serious crime"<sup>25</sup> is subject to a mandatory denial of removal under both the INA and the Convention.<sup>26</sup> Ghaziaskar's criminal conviction was for "using a telephone to facilitate the distribution of opium."<sup>27</sup> The Third Circuit agreed with the Immigration Judge's ("I.J.") determination that Ghaziaskar was ineligible to receive withholding of removal based on this conviction.<sup>28</sup> However, the issue of whether Ghaziaskar should be denied deferral of removal under the Convention still remains. The deferral of removal provision under which Ghaziaskar is entitled to protection reads as follows:

An alien who: has been ordered removed; has been found under § 208.16(c)(3) to be entitled to protection under the Convention Against Torture; and is subject to the provisions for mandatory denial of withholding of removal under §§ 208.16(d)(2) or (d)(3), shall be granted *deferral of removal to the country where he or she is more likely than not to be tortured*.<sup>29</sup>

It follows that although both the I.J. and the Third Circuit denied complete withholding of removal, this provision still

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<sup>22</sup> Ghaziaskar v. Attorney Gen. for the U.S., 343 F. App'x 762, 763 (3d Cir. 2009).

<sup>23</sup> *Id.* ("Aliens are disqualified from receiving such withholding of removal, however, if they have been convicted of a 'particularly serious crime.'").

<sup>24</sup> Immigration and Nationality Act of 1952, Pub. L. No. 414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§1101-1537 (2006)).

<sup>25</sup> 8 U.S.C. § 1231(b)(3)(B)(ii) (2011).

<sup>26</sup> 8 C.F.R. § 208.16(d)(2) (2011).

<sup>27</sup> Ghaziaskar, 343 F. App'x at 763, *supra* note 22.

<sup>28</sup> *See id.* at 764.

<sup>29</sup> 8 C.F.R. § 208.17(a) (2011) (emphasis added).

allows Ghaziaskar's claim for deferral of removal to be considered by the appeals court.

*D. Ghaziaskar's Potentially Anti-Iranian Activities*

Ghaziaskar claims that during his time in the U.S., he participated in activities that could be viewed as anti-Iranian.<sup>30</sup> He participated in a radio program called the "Persian Hour," which Ghaziaskar argues is anti-Khomeini and anti-government.<sup>31</sup> According to the radio show's host, Sharokh Nikfar, the show aims to "educate Americans about the beauty of Persian culture."<sup>32</sup> However, Nikfar also believes that Islam and the Persian culture are often at odds,<sup>33</sup> which could be viewed by the Iranian government as problematic. Ghaziaskar also converted to Christianity and said that he and his family went to "Catholic services and took communion" while in the U.S.<sup>34</sup> Although the I.J. disputed Ghaziaskar's credibility regarding the likelihood of torture, the Third Circuit found that the I.J.'s conclusions were not accurate.<sup>35</sup> The I.J. believed that there were "enormous gaps in the respondent's credibility."<sup>36</sup> His conclusion was based on the fact that the radio broadcast occurred after the Iranian revolution, and because he did not believe Ghaziaskar's explanation for why he possessed two passports.<sup>37</sup>

*E. Ghaziaskar's Claims*

Ghaziaskar petitioned the Third Circuit Court of Appeals to review two claims.<sup>38</sup> The first is the Board of Immigration Appeals' ("B.I.A.") determination that he was ineligible for withholding of removal due to a prior criminal conviction for drug

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<sup>30</sup> *Ghaziaskar*, 343 F. App'x. at 765, *supra* note 22.

<sup>31</sup> *Id.*

<sup>32</sup> See Mary Stamp, *Pain of Discrimination Stirs Empathy and Radio Show*, THE FIG TREE (Jan. 2008), <http://www.thefigtree.org/jan08/010108snikfar.html>.

<sup>33</sup> *Id.*

<sup>34</sup> *Ghaziaskar*, 343 F. App'x. at 765, *supra* note 22.

<sup>35</sup> See *id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* There is no further explanation of the I.J.'s conclusions in the Third Circuit's opinion. See *id.* The opinion only goes on to state that the I.J.'s conclusions ignore "the seriousness of his claim and the potential for harm that may await him in Iran." *Id.*

<sup>38</sup> *Id.* at 763.



trafficking.<sup>39</sup> His second challenge, which is the main focus of this Note, is the B.I.A.'s refusal to defer removal under the Convention.<sup>40</sup> The Third Circuit affirmed the B.I.A.'s refusal of withholding of removal, but remanded Ghaziaskar's claim under the Convention<sup>41</sup> based on the possibility of torture upon returning to Iran.<sup>42</sup> The court found that both the B.I.A. and the I.J.<sup>43</sup> had not adequately considered the country conditions in Iran before rejecting his claim under the Convention and remanded this claim to the B.I.A.<sup>44</sup>

#### *F. Non-Precedential Opinions*

Ghaziaskar's case presents interesting human rights issues in the context of a particularly volatile Middle East. However, Ghaziaskar's case has been designated as "non-precedential" by the Third Circuit.<sup>45</sup> In 2006, the Supreme Court adopted the Federal Rule of Appellate Procedure 32.1, which no longer forbids courts to cite to unpublished appellate decisions.<sup>46</sup> This rule encompasses non-precedential decisions and other unpublished decisions, and states that "[a] court may not prohibit or restrict the citation" of these opinions.<sup>47</sup> Courts are still adapting to this rule, and many circuits have enacted their own procedures regarding citation of these opinions.<sup>48</sup> The Third Circuit has not amended its

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<sup>39</sup> *Id.* (discussing Ghaziaskar's conviction for using a telephone to distribute opium).

<sup>40</sup> *Ghaziaskar*, 343 F. App'x. at 765, *supra* note 22.

<sup>41</sup> Convention Against Torture, *supra* note 7.

<sup>42</sup> *Ghaziaskar*, 343 F. App'x at 765-66, *supra* note 22.

<sup>43</sup> For the purposes of this note, B.I.A. and I.J. will be used interchangeably and in conjunction with each other, given the fact that in *Ghaziaskar*, the B.I.A. affirmed the I.J.'s decision, and because neither of these decisions are published.

<sup>44</sup> Duffy, *supra* note 3.

<sup>45</sup> *Ghaziaskar*, 343 F. App'x at 762, *supra* note 22.

<sup>46</sup> FED. R. APP. P. 32.1.

<sup>47</sup> *Id.*; see also Harold C. Wegner, *The Non-Precedential Claim Construction Black Hole* 31, n. 78 (Aug. 2006),

[http://www.patenthawk.com/blog\\_docs/060814\\_BlackHoleClaimConstruction\\_Wegner.pdf](http://www.patenthawk.com/blog_docs/060814_BlackHoleClaimConstruction_Wegner.pdf) (providing further explanation of non-precedential claims).

<sup>48</sup> Sarah E. Ricks, *Essay: A Modest Proposal for Regulating Unpublished, Non-Precedential Federal Appellate Opinions While Courts and Litigants Adapt to Federal Rule of Appellate Procedure 32.1*, 9 J. APP. PRAC. & PROCESS 17, 22-24 (2007). Rule 32.1 only governs the citation of unpublished opinions. *Id.* at 21. Justice Alito has

procedures, which already permitted the citation of non-precedential opinions, “except by the Third Circuit itself.”<sup>49</sup> Thus, although rules may vary by circuit, most would give some weight to non-precedential opinions.

This case was chosen as the topic of this Note, even though it is non-precedential, because of the interesting and timely issues it presents regarding the Convention and the unique situation involving aliens who have been convicted of a crime. It also highlights the significance of considering the most current assessments of the country conditions in an alien’s home country in order to more adequately assess the true risk of torture to help achieve the purpose of the Convention.

## II. Statement of the Case

### A. Board of Immigration Appeals Cases

The B.I.A. is a federal agency that is part of the Executive Office for Immigration Review in the Department of Justice.<sup>50</sup> It enforces immigration laws and issues appellate administrative decisions.<sup>51</sup> These decisions are binding on both the Department of Homeland Security and Immigration Judges, but the Attorney General may modify or overrule B.I.A. decisions.<sup>52</sup> Although the B.I.A. is not a federal court, federal courts may review its decisions.<sup>53</sup> Thus, in the case of *Ghaziaskar v. Attorney General*, the Third Circuit Court of Appeals had the jurisdiction to review the B.I.A. decision.<sup>54</sup>

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explained that the rule does not address “whether refusing to treat an unpublished opinion of a federal court as binding precedent is constitutional.” *Id.* at 22. The rule does not “require the federal circuits to assign a particular value to the circuit’s own unpublished opinions, or to set criteria that appellate panels must weigh in determining whether to assign precedential value to a particular opinion.” *Id.*

<sup>49</sup> *Id.* at 22, n. 17.

<sup>50</sup> See *Precedent Decisions*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=f2c29c7755cb9010VgnVCM10000045f3d6a1RCRD&vgnnextchannel=f2c29c7755cb9010VgnVCM10000045f3d6a1RCRD> (last updated Oct. 20, 2010).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> B.I.A. decisions reviewed at *Attorney General and B.I.A. Precedent Decisions*, EOIR VIRTUAL LAW LIBRARY, [http://www.justice.gov/eoir/vll/intdec/lib\\_indecitnet.html](http://www.justice.gov/eoir/vll/intdec/lib_indecitnet.html)

*B. Facts and Procedure*

The facts provided by the Third Circuit's opinion are sparse.<sup>55</sup> Some of the relevant facts can be obtained from a prior immigration habeas proceedings case, *Ghaziaskar v. Ashcroft*, in which Ghaziaskar was involved.<sup>56</sup> Mohammad Ghaziaskar came to the United States on a student visa in 1974.<sup>57</sup> He became a lawful permanent resident in 1978, and sometime thereafter<sup>58</sup> removal proceedings were commenced against him because he incurred a criminal charge.<sup>59</sup> Ghaziaskar was detained in the Bureau of Immigration and Customs Enforcement at the York County Prison located in York, Pennsylvania.<sup>60</sup> When he was ordered removed from the United States,<sup>61</sup> Ghaziaskar commenced actions to challenge his removal and detention.<sup>62</sup>

The procedure in this case is difficult to follow because the I.J./B.I.A. decisions are unpublished and unavailable.<sup>63</sup> *Ghaziaskar v. Attorney General* states that a final order of removal against Ghaziaskar was entered by the B.I.A., affirming the I.J.'s ruling that Ghaziaskar was "statutorily ineligible for withholding of removal to Iran"<sup>64</sup> based on a criminal conviction for drug trafficking.<sup>65</sup> The B.I.A. also denied Ghaziaskar's second claim,

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(last visited Feb. 6, 2011).

<sup>55</sup> See *Ghaziaskar v. Attorney Gen. for the U.S.*, 343 F. App'x 762, 763 (3d Cir. 2009) ("Because we write primarily for the parties, it is not necessary to recite the facts or history of this case except as may be helpful to our brief discussion.").

<sup>56</sup> *Ghaziaskar v. Ashcroft*, No. Civ. 3CV041520, 2005 WL 1138377, at \*1 (M.D. Pa. Apr. 27, 2005).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* (The date on which the removal proceedings were commenced is not stated in the opinion.).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Ghaziaskar v. Ashcroft*, No. Civ. 3CV041520, 2005 WL 1138377, at \*1 (M.D. Pa. Apr. 27, 2005).

<sup>63</sup> See *Attorney General and B.I.A. Precedent Decisions*, *supra* note 54, for all B.I.A. decisions. As of February 2011, Ghaziaskar's B.I.A. case could not be located in these volumes.

<sup>64</sup> *Ghaziaskar v. Attorney Gen. for the U.S.*, 343 F. App'x 762, 763 (3d Cir. 2009).

<sup>65</sup> See *id.* (stating that Ghaziaskar's conviction was for "the use of a telephone to facilitate distribution of opium, in violation of 21 U.S.C. § 843(b)").

which was a motion to defer his removal under the Convention.<sup>66</sup>

*Ghaziaskar v. Ashcroft* was filed in the District Court for the Middle District of Pennsylvania in 2005.<sup>67</sup> In this case, Ghaziaskar challenged his removal and detention, but also claimed that his “substantive and procedural due process rights” were violated.<sup>68</sup> He filed several different motions, including emergency petitions for *writ of habeas corpus*, a motion for judgment as a matter of law, and a motion for expedited review of the case.<sup>69</sup> The district court dismissed the emergency petitions for *writ of habeas corpus* and denied all subsequent motions.<sup>70</sup>

### C. Holding

The Third Circuit Court of Appeals in *Ghaziaskar v. Attorney General* affirmed the I.J./B.I.A. denial of withholding of removal based on Ghaziaskar’s prior criminal conviction.<sup>71</sup> However, the Third Circuit remanded Ghaziaskar’s claim for relief under the Convention to the B.I.A. for further consideration.<sup>72</sup> The Third Circuit based this determination on the fact that the record does not establish that the I.J. or B.I.A. adequately considered conditions in Iran before reaching its conclusion that Ghaziaskar failed to establish that it was more likely than not that he would be tortured upon his return to Iran.<sup>73</sup> The Third Circuit stated that it was also necessary to take judicial notice of the current country conditions in Iran and that these conditions would only serve to exacerbate Iran’s “already shameful record of respecting human rights.”<sup>74</sup> It directed the B.I.A. to more closely examine and consider the Country Reports<sup>75</sup> and to give more weight to the

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<sup>66</sup> *Id.*

<sup>67</sup> *Ghaziaskar v. Ashcroft*, No. Civ. 3CV041520, 2005 WL 1138377 (M.D. Pa. Apr. 27, 2005).

<sup>68</sup> *Id.* at \*1.

<sup>69</sup> *Id.* at \*2.

<sup>70</sup> *Id.* at \*2-3.

<sup>71</sup> See *Ghaziaskar*, 343 F. App’x at 763, *supra* note 64 (With regard to this claim, the court presumed that “any drug trafficking crime is presumed to be a particularly serious offense,” and Ghaziaskar did not successfully overcome this presumption.).

<sup>72</sup> *Id.* at 766.

<sup>73</sup> *Id.* at 765.

<sup>74</sup> *Id.*

<sup>75</sup> See U.S. DEPARTMENT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS

possibility that the activities that Ghaziaskar participated in while in the U.S. “could well subject him to the kind of intentional mistreatment that the Convention was intended to protect against.”<sup>76</sup>

In assessing an alien’s claims under the Convention, courts and judges must consider all relevant evidence, including

- (i) evidence of past torture inflicted upon the applicant; (ii) evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured; (iii) evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and (iv) other relevant information regarding conditions in the country of removal.<sup>77</sup>

In considering these factors, the Third Circuit pointed to particular instances of human rights violations in the 2002 Country Reports.<sup>78</sup> These violations included the following: “‘systematic abuses’ of human rights in Iran including summary executions and the widespread use of torture”;<sup>79</sup> the subjection of Iranians that return from travel abroad to “searches and extensive questioning for evidence of anti-government activities abroad”;<sup>80</sup> Iran’s judiciary being “subject to government and religious influence resulting in lack of due process and fair trials”;<sup>81</sup> and “numerous credible reports that security forces and prison personnel continue to torture detainees and prisoners.”<sup>82</sup>

The Third Circuit also disagreed with the B.I.A./I.J.’s determination that there were gaps in Ghaziaskar’s credibility.<sup>83</sup>

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PRACTICES FOR 2002, S. PRT. NO. 108-30, at 1904 (2003). These reports are released annually by the U.S. Department of State and represent “a full and complete report regarding the status of internationally recognized human rights.” *Id.* at xiii.

<sup>76</sup> *Ghaziaskar*, 343 F. App’x. at 766, *supra* note 64.

<sup>77</sup> 8 C.F.R. § 1208.16(c)(3) (2011).

<sup>78</sup> *See Ghaziaskar*, 343 F. App’x at 765, *supra* note 64.

<sup>79</sup> *Id.* (citing J.A. 304a-05a).

<sup>80</sup> *Id.* (citing J.A. 319a).

<sup>81</sup> *Id.* (citing J.A. 309-a-10a).

<sup>82</sup> *Id.* (citing J.A. 307a).

<sup>83</sup> *See id.* at 765. *See also* *Gao v. Ashcroft*, 299 F.3d 266, 272 (3d Cir. 2002) (citing Immigration and Nationality Act § 242(b)(4)(B), 8 U.S.C. § 1252(b)(4)(B)). An adverse credibility determination will be upheld unless “any reasonable adjudicator would be compelled to conclude to the contrary.” *Id.*; *Dia v. Ashcroft*, 353 F.3d 228,

The I.J. was not convinced that Ghaziaskar's involvement in the "Persian Hour" radio show was "anti-Khomeini" or "anti-government based" on the fact that the broadcast occurred after the revolution of 1979.<sup>84</sup> The I.J. also discredited other facts,<sup>85</sup> including Ghaziaskar's explanation for having two passports and his "sudden conversion to Christianity."<sup>86</sup> However, the Third Circuit found that the I.J.'s credibility determination was erroneous.<sup>87</sup> With regard to the radio show, the Third Circuit found that the I.J. ignored the seriousness of Ghaziaskar's claim and the potentially harmful actions that could result if his involvement with this program was seen as disfavoring the Iranian regime.<sup>88</sup> Furthermore, the Third Circuit found that it was "erroneous" to dismiss the seriousness of this involvement because in reality, it occurred *before* the overthrow of the Shah.<sup>89</sup> Similarly, the Third Circuit found that the I.J.'s conclusion discrediting Ghaziaskar's conversion to Christianity was incorrect because it was "based upon the I.J.'s understanding of practices of Christian churches he is familiar with."<sup>90</sup> The I.J. concluded that Ghaziaskar would only be able to take communion if he was a member of the Catholic church.<sup>91</sup> However, the Third Circuit found that there was nothing in the record to suggest that Christian churches in Iran use the same protocols as those churches in the U.S.; thus, there was no reason to discredit Ghaziaskar's conversion to Christianity.<sup>92</sup>

In sum, the Third Circuit found that Ghaziaskar's participation in activities in the U.S. should be taken more seriously when

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247 (3d Cir. 2003) (stating that "an alien's credibility, by itself may satisfy his burden, or doom his claim").

<sup>84</sup> *Ghaziaskar*, 343 F. App'x at 765, *supra* note 64.

<sup>85</sup> *Id.* Ghaziaskar provided an explanation for why he had two passports, but the I.J. did not give credit to this explanation.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* (emphasis added) (Unfortunately, because the B.I.A./I.J. decisions could not be located, there is no further explanation of the I.J.'s conclusions regarding his consideration of the seriousness of Ghaziaskar's claims.).

<sup>90</sup> *Ghaziaskar*, 343 F. App'x at 765, *supra* note 64.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

viewed in conjunction with the current conditions in Iran, and his claim should be remanded to the B.I.A. for more careful consideration of these conditions.<sup>93</sup>

### III. Background Law

#### A. *Convention Against Torture*<sup>94</sup>

The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,<sup>95</sup> a human rights instrument, aims to recognize that “the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”<sup>96</sup> The principal aim of the Convention is not to outlaw torture,<sup>97</sup> but “to strengthen the existing prohibition of such practices by a number of supportive measures.”<sup>98</sup> Further, it is important to note that the Convention only applies to those practices that take place under the responsibility of a public official or others who are acting in their official capacity.<sup>99</sup>

The Convention was implemented by the Foreign Affairs Reform and Restructuring Act of 1998.<sup>100</sup> Under the Convention, an alien may not be removed if he establishes that “it is more likely than not that he will be tortured by or at the instigation of the government if removed to his home country.”<sup>101</sup> An alien may be protected under the Convention either by being granted withholding of removal or deferral of removal, depending on the

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<sup>93</sup> See *id.* at 766.

<sup>94</sup> For a detailed overview of the Convention, see J. HERMAN BURGERS & HANS DANIELIUS, *THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT* (Kluwer Academic Publishers 1988) (providing a description, analysis, and summary of the historical background of the Convention).

<sup>95</sup> Convention Against Torture, *supra* note 7.

<sup>96</sup> *Id.* at pmb1.

<sup>97</sup> See BURGERS & DANIELIUS, *supra* note 94, at 1 (stating that the Convention does not aim to outlaw torture because it is based on the presumption that torture and other forms of degrading treatment are “already outlawed by international law”).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Kamalthas v. I.N.S.*, 251 F.3d 1279, 1281 (9th Cir. 2001).

<sup>101</sup> *Ghaziaskar v. Attorney Gen. for the U.S.*, 343 F. App'x 764 (3d Cir. 2009) (citing 8 C.F.R. § 208.18(a)(1)).

type of protection the alien may be entitled to.<sup>102</sup>

The standard determination for granting relief in the United States under the Convention is whether or not it is “more likely than not that he or she would be tortured if removed to the proposed country of removal.”<sup>103</sup> The applicant petitioning for relief has the burden of establishing this standard.<sup>104</sup> If the testimony of the applicant is deemed credible, it “may be sufficient to sustain the burden of proof without corroboration.”<sup>105</sup>

Pursuant to Article I of the Convention, “torture” is defined as: any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.<sup>106</sup>

This definition of torture is highly specific and does not include any pain or suffering that arises as a result of lawful sanctions<sup>107</sup> or any act that is the result of “unanticipated or unintended severity of pain and suffering.”<sup>108</sup> Thus, the torture must be specifically directed against a particular person and must be perpetrated by a person acting in their official capacity.<sup>109</sup> In evaluating the objective evidence under the Convention, the decision-makers’ considerations must include, but are not limited to, “evidence of past torture inflicted upon the applicant; evidence of gross, flagrant or mass violations of human rights within the country of removal; and other relevant information regarding

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<sup>102</sup> See 8 C.F.R. § 208.16(c)(4) (2009).

<sup>103</sup> *Id.* at § 208.16(c)(2).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at § 208.18(a)(1).

<sup>107</sup> *Id.* at § 208.18(a)(3).

<sup>108</sup> 8 C.F.R. § 208.18(a)(5) (2009).

<sup>109</sup> *Id.* at § 208.18(a)(6).



conditions in the country of removal.”<sup>110</sup>

Once the I.J. determines that the alien is more likely than not to be tortured upon removal, the alien is entitled to protection either in the form of withholding of removal or deferral of removal.<sup>111</sup> As stated in Part I (Effect of Criminal Conviction on Removal under the Convention), Ghaziaskar qualifies for deferral of deportation under 8 C.F.R. § 208.17(a).<sup>112</sup> If the I.J. determines that an alien under this section is entitled to relief, the alien's removal is deferred until deferral is terminated.<sup>113</sup> Termination of deferral may be initiated by the Immigration and Nationalization Services District Counsel, by the Attorney General, or by the alien himself.<sup>114</sup>

### B. Case Law

The cases prior to *Ghaziaskar* illustrate different approaches to the treatment of aliens under the Convention and differing amounts of consideration given to then-current conditions in the aliens' home countries.

In *Hosseini v. Gonzales*,<sup>115</sup> decided in 2006, the court focused on the alien's specific involvement with terrorism and how this supported the likelihood of torture if removed. The court also clarified what could be regarded as “lawful sanctions.”<sup>116</sup> The Ninth Circuit held that Hosseini, an Iranian citizen, was entitled to deferral of removal under the Convention.<sup>117</sup> Hosseini convinced the court that it was more likely than not he would be tortured because he presented credible evidence showing involvement with

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<sup>110</sup> *Francois v. Gonzales*, 448 F.3d 645, 650 (3d Cir. 2006) (citing 8 C.F.R. § 208.16(c)(3) (2009)).

<sup>111</sup> *See* 8 C.F.R. § 208.16(c)(4) (2009).

<sup>112</sup> *See id.* at § 208.17(a) (“An alien who: has been ordered removed; has been found under § 208.16(c)(3) to be entitled to protection under the Convention Against Torture; and is subject to the provisions for mandatory denial of withholding of removal under § 208.16(d)(2) or (d)(3), shall be granted deferral of removal to the country where he or she is more likely than not to be tortured.”).

<sup>113</sup> *Id.* at § 208.17(b)(1).

<sup>114</sup> *Id.* at § 208.17(d)-(f).

<sup>115</sup> *Hosseini v. Gonzales*, 471 F.3d 953 (9th Cir. 2006).

<sup>116</sup> *Id.* at 960.

<sup>117</sup> *Id.* at 961.

the terrorist group MEK<sup>118</sup> and that this involvement would likely attract the attention of Iranian authorities.<sup>119</sup> The Ninth Circuit reversed the B.I.A. after concluding that there was concrete evidence from State Department reports establishing that “once Iranian authorities identify Hosseini as an MEK supporter he is likely to be tortured.”<sup>120</sup> Because the Convention does not include the torture that arises from lawful sanctions,<sup>121</sup> *Hosseini* shows that there must be evidence that torture other than lawfully sanctioned torture is likely. Lawful sanctions include “judicially imposed sanctions and other enforcement actions authorized by law, including the death penalty, but do not include judicially imposed sanctions that defeat the object and purpose of” the Convention.<sup>122</sup> Here, the court states that the Country Reports<sup>123</sup> make it clear that the treatment of those affiliated with the MEK would go “far beyond what could reasonably be regarded as ‘lawful sanctions.’”<sup>124</sup>

In 2001, the court in *Kamalthas v. I.N.S.*<sup>125</sup> interpreted the standard for relief under the Convention, which places the burden of proof on the petitioner to show that it is “more likely than not” that the petitioner would be tortured if removed.<sup>126</sup> It also focused

<sup>118</sup> See Holly Fletcher, *Mujahadeen-e-Khalq*, COUNCIL ON FOREIGN RELATIONS, <http://www.cfr.org/publication/9158/> (last updated April 18, 2008) (stating that the MEK is the Mujahadeen-e-Khalq and is the largest and most militant terrorist group that is opposed to Iran).

<sup>119</sup> *Hosseini*, 471 F.3d at 960, *supra* note 115.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* (citing 8 C.F.R. § 208.18(a)(3) (2006)). The Convention, “as ratified by the United States,” does not include lawful sanctions. *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*; see also U.S. Department of State, *Country Reports on Human Rights Practices for 2000*, <http://www.state.gov/g/drl/rls/hrrpt/2000/nea/786.htm> (last visited Feb. 6, 2011).

<sup>124</sup> *Id.*

<sup>125</sup> *Kamalthas v. INS*, 251 F.3d 1279 (9th Cir. 2001).

<sup>126</sup> *Id.* The court distinguished between the Convention’s “more likely than not” standard and the standard for claims for asylum or withholding of deportation, concluding that the Convention’s coverage is:

broader because a petitioner need not show that he or she would be tortured ‘on account of’ a protected ground; it is narrower, however, because the petitioner must show that it is ‘more likely than not’ that he or she will be tortured, and not simply persecuted upon removal to a given country.

on the decisive role that country conditions play in making determinations under the Convention.<sup>127</sup> The Ninth Circuit found that the inability of a Sri Lankan alien to “state a cognizable asylum claim does not necessarily preclude relief under the Convention Against Torture (“CAT”).”<sup>128</sup> The holding was based on the B.I.A.’s abuse of discretion in failing to recognize the importance of country conditions and that such conditions on their own may “play a decisive role in granting relief” under the Convention.<sup>129</sup> The court found that the B.I.A. must give due weight to the relevant country conditions in Sri Lanka, which included evidence of widespread torture of Tamil males such as Kamalthas.<sup>130</sup>

In contrast, other courts have denied relief under the Convention. In 2004, the court in *Berishaj v. Ashcroft* focused on the changed country conditions as evidence that torture was not likely.<sup>131</sup> In this case, the court denied relief to Berishaj, an ethnic Albanian from Montenegro, under the Convention because there was no objective evidence showing that he would be exposed to torture upon returning to Montenegro.<sup>132</sup> The court focused on the need for current records on conditions in the petitioner’s home country.<sup>133</sup> The use of old administrative records presents problems, according to the court, because appellate courts may make their decisions based on country conditions much different than the current conditions, which can “give rise to potentially devastating consequences to an applicant who faces the possibility of persecution (or worse) if he is removed.”<sup>134</sup>

The deference owed to administrative agencies under *Chevron*

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*Id.* at 1283.

<sup>127</sup> *Id.* at 1283-84.

<sup>128</sup> *Id.* at 1280.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 1284.

<sup>131</sup> *Berishaj v. Ashcroft*, 378 F.3d 314 (3d Cir. 2004).

<sup>132</sup> *Id.* at 317. The court stated that “CAT claims are entirely concerned with the objective likelihood of torture in the future, and Berishaj’s testimony did not address contemporary treatment of disfavored persons in Montenegro in any particularized way.” *Id.* at 332.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 329.

*U.S.A. Inc. v. Natural Resources Defense Council*<sup>135</sup> and *S.E.C. v. Chenery Corp.*<sup>136</sup> may present obstacles to solving the problem of using outdated records in deportation proceedings, but the court in *Berishaj* still suggests that the use of “stale records”<sup>137</sup> in evaluating claims under the Convention should be addressed.<sup>138</sup> In *Chenery*, the Supreme Court held that “the grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.”<sup>139</sup> The Court in *Chevron* held that reviewing courts are confronted with two questions: “whether Congress has directly spoken to the precise question at issue,” and “if the statute is silent or ambiguous with respect to the specific issue . . . whether the agency’s answer is based on a ‘permissible construction’ of the statute.”<sup>140</sup> The *Berishaj* court states that the use of stale records is disturbing because administrative records may be outdated, meaning that judges make rulings based on situations that may not presently exist.<sup>141</sup> Using current reports of country conditions could ensure that “all may have the confidence that the ultimate disposition of a removal case bears a meaningful connection to the merits of the petitioner’s claim(s) in light of contemporary world affairs.”<sup>142</sup>

In *Francois v. Gonzales*, the Third Circuit also denied relief and further defined what constitutes “torture” under the Convention.<sup>143</sup> Specifically, the court focused on the need for concrete and “intentional direction of pain and suffering.”<sup>144</sup> In denying relief to Francois, a Haitian alien, the court based its holding on the conclusion that the petitioner’s claim depended solely on Haiti’s general prison conditions and not specific treatment that he would receive upon removal to Haiti.<sup>145</sup> Francois

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<sup>135</sup> See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

<sup>136</sup> See *SEC. v. Chenery Corp.*, 318 U.S. 80 (1943).

<sup>137</sup> See *Berishaj*, 378 F.3d at 317, *supra* note 131.

<sup>138</sup> *Id.* (calling on Congress and relevant government agencies to improve the system “in light of contemporary world affairs”).

<sup>139</sup> *Chenery*, 318 U.S. at 87, *supra* note 136.

<sup>140</sup> *Chevron*, 467 U.S. at 842-43, *supra* note 135.

<sup>141</sup> *Berishaj*, 378 F.3d at 317, *supra* note 131.

<sup>142</sup> *Id.*

<sup>143</sup> See *Francois v. Gonzales*, 448 F.3d 645 (3d Cir. 2006).

<sup>144</sup> *Id.* at 652.

<sup>145</sup> *Id.* at 650.

claimed that he was entitled to relief under the Convention because he would be detained indefinitely in a Haitian prison and would experience conditions that are “tantamount to ‘torture.’”<sup>146</sup> However, this claim was not sufficiently specific to merit relief, and the likelihood of harsh prison conditions does not amount to torture under the Convention.<sup>147</sup> The court acknowledged that Francois will face “inhumane and deplorable” conditions, but reiterated that this does not meet the definition of torture under the Convention and previous case law.<sup>148</sup>

#### IV. Analysis

Like many other aliens facing the possibility of deportation, Ghaziaskar has real fears about being tortured if forced to return to his home country.<sup>149</sup> Although the activities he has participated in may appear insignificant to most people,<sup>150</sup> these activities might look very different to security forces in Iran, who may view them as anti-government and anti-Islam, especially in the immediate aftermath of such a volatile presidential election.<sup>151</sup> Though it has not yet been determined whether Ghaziaskar's fears are sufficient for relief under the Convention, the court took an important step in ensuring that Ghaziaskar's claims get adequate consideration and that the current country conditions in Iran are given greater weight. In addition, the Third Circuit's consideration of current country conditions in Iran may help to strengthen the Convention and allow the fairest and most accurate assessment of claims to those facing deportation.

The Convention explicitly requires consideration of several important factors in determining whether it is more likely than not that an alien will be tortured.<sup>152</sup> Generalized or possible fear of

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<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 652.

<sup>148</sup> *Id.* at 651 (relying on the definition of torture in *Auguste v. Ridge*, 395 F.3d 123 (3d Cir. 2005)).

<sup>149</sup> *Ghaziaskar v. Attorney Gen. for the U.S.*, 343 F. App'x 762, 763 (3d Cir. 2009).

<sup>150</sup> *Id.*

<sup>151</sup> *See, e.g., Slackman, supra* note 1, at A20 (describing conditions surrounding the June 2009 Iranian election).

<sup>152</sup> 8 C.F.R. § 208.16(c)(3) (2011) (including, *inter alia*, evidence of past torture or mass violations of human rights in the country).

torture will not suffice under the Convention.<sup>153</sup> The Third Circuit's opinion in *Ghaziaskar* reinforces the importance of considering all relevant factors under the Convention and examining current country conditions in assessing an alien's potentially life-threatening fears of torture.<sup>154</sup> In addition, the United States' current relationship with Iran may influence decisions under the Convention. Although the Country Reports provide a factual overview of the conditions in Iran, recent evidence of torture in the news further highlights the need for consideration of the most current conditions.<sup>155</sup>

#### A. Administrative Deference under *Chevron*

Because *Ghaziaskar* involves the decision of the B.I.A., an administrative agency, the standard of review for this decision and other immigration proceedings based on B.I.A. opinions is different from administrative proceedings not involving immigration issues. Although administrative deference is not the focus of this Note, it is necessary to understand the influence that administrative law has on the analysis of *Ghaziaskar*. Under *Chevron v. Natural Resources Defense Council*,<sup>156</sup> an administrative agency's decision is accorded a great amount of deference.<sup>157</sup>

*Ghaziaskar* and several other cases cited in this Note involve the I.J.'s judgment of the alien's credibility. These adverse credibility determinations are reviewed for "substantial evidence" and may be reversed if they are based on "speculation or conjecture, rather than on evidence in the record."<sup>158</sup> There must

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<sup>153</sup> See, e.g., *Francois*, 448 F.3d at 645 (holding that complaints of general inhumane conditions do not meet the standard required for relief under the Convention, but petitioner needed to claim specific treatment).

<sup>154</sup> See *Ghaziaskar*, 343 F. App'x at 764-65, *supra* note 149.

<sup>155</sup> See, e.g., *Slackman*, *supra* note 1; *Fletcher*, *supra* note 2.

<sup>156</sup> *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984).

<sup>157</sup> *Id.* at 844 ("We have long recognized . . . the principle of deference to administrative interpretations.").

<sup>158</sup> See *Ghaziaskar*, 343 F. App'x. at 764, *supra* note 149 (citing *Berishaj v. Ashcroft*, 378 F.3d 314, 322-23 (3d Cir. 2004) ("An I.J.'s adverse credibility determination is 'reviewed for substantial evidence.'"); see also *Gao v. Ashcroft*, 299 F.3d 266, 272 (3d Cir. 2002).

be “specific, cogent reasons”<sup>159</sup> for an adverse credibility determination, and no deference is due when the conclusion is based on reasons not specifically grounded in the record.<sup>160</sup> However, deference must be given unless “any reasonable adjudicator would be compelled to conclude to the contrary.”<sup>161</sup> *Ghaziaskar* presents an example of a case in which the court found that the I.J.’s adverse credibility determination was erroneous.<sup>162</sup> Specifically, the court found the I.J. based his decision on his own notions of the Christian church in discrediting Ghaziaskar’s conversion to Christianity.<sup>163</sup> Therefore, deference was not given to the I.J.’s adverse credibility determination.<sup>164</sup>

Administrative deference is also significant when courts review the B.I.A. or I.J.’s consideration of country conditions and whether or not the alien has carried his burden of showing whether it is more likely than not that he will be tortured. The reviewing court can only act upon a closed record in order to give the agency the authority and deference that it deserves and to prevent “undue interference by generalist courts.”<sup>165</sup> Under *Chevron*, the B.I.A.’s conclusions regarding matters of law are reviewed de novo by appellate courts, “except to the extent that they involve interpretations of ambiguous statutory provisions that were intended by Congress to be left to the B.I.A.’s discretion.”<sup>166</sup> In these situations, deference must be given to the B.I.A. interpretation as long as it does not go against congressional intent.<sup>167</sup> Factual findings that the B.I.A. makes “are reviewed under the ‘substantial evidence’ standard.”<sup>168</sup>

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<sup>159</sup> *Berishaj*, 378 F.3d at 324, *supra* note 131.

<sup>160</sup> *Id.* at 324-25 (citing *Dia v. Ashcroft*, 353 F.3d 228, 249-50 (3d Cir. 2003)).

<sup>161</sup> *Id.* at 322 (quoting 8 U.S.C. § 1252(b)(4)(B) (2011)).

<sup>162</sup> *Ghaziaskar*, 343 F. App’x at 765-66, *supra* note 149.

<sup>163</sup> *Id.* at 776. Based on a finding that Ghaziaskar lacked credibility, the I.J. discredited Ghaziaskar’s reasoning for having two passports. However, the court found that the I.J.’s focus on this passport discrepancy ignored the seriousness of Ghaziaskar’s claim and the fact that harm could await him in Iran if forced to return.

<sup>164</sup> *See id.*

<sup>165</sup> *Berishaj v. Ashcroft*, 378 F.3d 314, 329 (3d Cir. 2004).

<sup>166</sup> *Kamalthas v. I.N.S.*, 251 F.3d 1279, 1281-82 (9th Cir. 2001).

<sup>167</sup> *Id.* at 1282.

<sup>168</sup> *Id.* at 1281.

*B. Consideration of Current Country Conditions*

The Third Circuit's holding with regard to Ghaziaskar's claim under the Convention focused on the B.I.A. and I.J.'s failure to adequately consider current conditions<sup>169</sup> in Iran before concluding that it was not "more likely than not that he would be tortured upon his return to Iran."<sup>170</sup> This note will not determine whether it is more likely than not that Ghaziskar would be tortured upon removal, since this is the task which the B.I.A. will undertake upon remand. Much of the importance of the Third Circuit's decision lies in its determination that there was not an adequate consideration of current conditions in Iran. Thus, the B.I.A. must reconsider Ghaziaskar's claim in light of the Third Circuit's determination that the agency adequately consider conditions in Iran before making a determination of his eligibility of deferral of removal under the Convention.

The *Ghaziaskar* court noted that the 2002 Country Reports were the most recent State Department reports that the B.I.A./I.J. could have considered.<sup>171</sup> Though these reports were several years old at the time of the Third Circuit's decision in 2009, even the 2002 Reports show that there were numerous human rights concerns in Iran deserving of attention.<sup>172</sup> The Convention specifically calls for consideration of "gross, flagrant or mass violations of human rights within the country of removal,"<sup>173</sup> yet the court found that neither the I.J. nor the B.I.A. adequately considered these conditions in making its decision.<sup>174</sup> Thus, the court made clear that upon remand, the B.I.A. must examine the

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<sup>169</sup> See *id.* (meaning the B.I.A. failed to consider the 2002 Country Reports, which were the most recent records available at the time).

<sup>170</sup> *Ghaziaskar v. Attorney Gen. for the U.S.*, 343 Fed. Appx. 762, 765 (3d Cir. 2009).

<sup>171</sup> See Duffy, *supra* note 3.

<sup>172</sup> See *Ghaziaskar*, 343 F. App'x. at 765, *supra* note 170. This includes "systematic abuses" of human rights, extensive questioning and searches imposed on Iranians returning from abroad, lack of due process and fair trials, and credible reports of torture of detainees and prisoners. *Id.*

<sup>173</sup> 8 C.F.R. § 208.16(c)(3)(iii) (2011).

<sup>174</sup> *Ghaziaskar*, 343 F. App'x. at 765, *supra* note 170. The case at hand does not go into any further detail about the I.J. or B.I.A.'s lack of consideration. In addition, as previously stated, the I.J. and B.I.A. decisions could not be located.



2002 Country Reports more closely.<sup>175</sup> In fact, the court went even further to demonstrate the significance of country conditions in Iran. The court stated, “[w]e also think it appropriate to take judicial notice of the fact that current tensions in Iran would only exacerbate what this record establishes as an already shameful record of respecting human rights.”<sup>176</sup> Although the court cannot substitute its own judgment regarding country conditions due to the need to afford *Chevron* deference to the I.J.’s conclusions, the *Ghaziaskar* court specifically addresses the relevance of current country conditions and reinforces the significance of the B.I.A.’s lack of consideration of these conditions. The *Berishaj* court notes that the Court of Appeals for the Seventh Circuit has taken judicial notice of developments after final agency determinations, and that sometimes courts have rested their decisions on these developments.<sup>177</sup>

*Berishaj* also highlights that review of agency actions is largely process-based, without much regard for the merits of the case.<sup>178</sup> However, it contrasts immigration proceedings with the traditional administrative law case. The type of review in immigration cases “can give rise to potentially devastating consequences to an applicant who faces the possibility of persecution (or worse) if he is removed.”<sup>179</sup> This might further demonstrate the need to adequately consider country conditions in assessing claims under the Convention and can distinguish immigration cases from many other administrative decisions where the consequences might not be as significant.

In *Berishaj*, the court takes a balancing approach to using the most current country records available in the record.<sup>180</sup> It states that “on the one hand, the B.I.A. may not . . . “place full and

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<sup>175</sup> See *id.* at 765-66.

<sup>176</sup> *Id.* at 765.

<sup>177</sup> *Berishaj v. Ashcroft*, 378 F.3d 314, 330 (3d Cir. 2004) (citing *Pelinkovic v. Ashcroft*, 366 F.3d 532, 540-41 (7th Cir. 2004)). Judicial notice was taken to determine that country conditions for ethnic Albanians have greatly improved since the 1990s. However, the court also notes that it finds this practice difficult to reconcile with the command from *SEC v. Chenery*, 318 U.S. 80 (1943).

<sup>178</sup> *Berishaj*, 378 F.3d at 329, *supra* note 177.

<sup>179</sup> *Id.*

<sup>180</sup> See *id.* at 320.

uncritical reliance on a country report,"<sup>181</sup> yet it is also impermissible "for the I.J. and B.I.A. not to address the relevant country report in some detail."<sup>182</sup> In considering Ghaziaskar's claims, it appears that the B.I.A. took the second approach noted in *Berishaj*, by not addressing the country reports in detail. However, the court in *Ghaziaskar* did not accept this approach, as evidenced by their remand of Ghaziaskar's claim to the B.I.A.

### *C. Consideration of Potentially Anti-Iranian Activities*

The court also demonstrates the weight, which must be accorded to Ghaziaskar's involvement in activities that could be viewed as anti-Iranian. The I.J. determined that there were "enormous gaps" in Ghaziaskar's credibility, and did not take seriously his participation in the radio show and his conversion to Christianity.<sup>183</sup> The adverse credibility determination in a claim under the Convention is highly important, given that if the testimony of the applicant is deemed credible, it "may be sufficient to sustain the burden of proof without corroboration."<sup>184</sup> However, the court found that the I.J. failed to recognize the seriousness of Ghaziaskar's involvement and the potentially harmful consequences that could occur upon his return to Iran, should these activities be deemed anti-Iranian.<sup>185</sup> The court specifically speaks to the importance of fully examining all evidence in claims under the Convention.<sup>186</sup> Although Ghaziaskar's involvement in the radio program and his conversion to Christianity do not automatically mean that he will be singled out and tortured, the court demonstrates that these actions cannot simply be disregarded as unimportant.

### *D. Berishaj and the Dangers in Using Stale Records*

The court in *Berishaj v. Ashcroft* focuses heavily on the

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<sup>181</sup> *Id.* (citing *Ezeagwuna v. Ashcroft*, 325 F.3d 396, 407 (3d Cir. 2003)).

<sup>182</sup> *Id.*

<sup>183</sup> *See Ghaziaskar v. Attorney Gen. for the U.S.*, 343 F. App'x. 762, 765 (3d Cir. 2009).

<sup>184</sup> 8 C.F.R. § 1208.16(c)(2) (2011); *see also Dia v. Ashcroft*, 353 F.3d 228, 247 (3d Cir. 2003) ("An alien's credibility, by itself may satisfy his burden, or doom his claim.").

<sup>185</sup> *Ghaziaskar*, 343 F. App'x. at 765, *supra* note 183.

<sup>186</sup> *Id.* at 764.

problem of courts using “stale records”<sup>187</sup> in assessing an alien’s deportation proceedings. The *Berishaj* court notes that although reviewing courts must act upon a closed record,<sup>188</sup> this may prove problematic in asylum law because claims often depend greatly on country conditions.<sup>189</sup> Because conditions can significantly change in between the time of the B.I.A./I.J. decision and that of the reviewing court, the reviewing court may face problems leading to no “reasonably recent final agency determination to review.”<sup>190</sup> *Berishaj* calls on Congress, the Department of Homeland Security, and the B.I.A. to improve the system in which these claims are evaluated in order to ensure that the outcomes of removal cases bear “a meaningful connection to the merits of the petitioner’s claim(s) in light of contemporary world affairs.”<sup>191</sup> The court reasons that “[c]onsidering the rapid, frequent political changes in countries from which asylum and CAT applicants usually come, and the potentially dire consequences of sending such an applicant back to his country of origin to face possible persecution or torture on the basis of such a stale report,”<sup>192</sup> such an improvement in the structure and operation of the system is necessary.

The *Berishaj* court’s advocacy of a new structure<sup>193</sup> to avoid the use of stale records may be controversial due to administrative law concerns. However, although the constraints of administrative law prevent courts from supplementing the record, “they do not command blindness to the emerging pattern of stale records.”<sup>194</sup> *Berishaj* and *Ghaziaskar* continue to highlight the important issues

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<sup>187</sup> See *Berishaj v. Ashcroft*, 378 F.3d 314, 317 (3d Cir. 2004).

<sup>188</sup> This is based on the deference given to administrative agencies in *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

<sup>189</sup> *Berishaj*, 378 F.3d at 328, *supra* note 187.

<sup>190</sup> *Id.* at 329-30 (exemplified in *Berishaj*, where the I.J. determined that the country conditions in Montenegro had greatly changed and found that *Berishaj* could no longer have a reasonable fear of persecution if forced to return).

<sup>191</sup> *Id.* at 317.

<sup>192</sup> *Id.*

<sup>193</sup> See *id.* at 330. The court gives several examples of what Congress could do to modify the structure, including changing the rules applicable to petitioner for review of a B.I.A. decision or requiring Courts of Appeals to grant petitions from the B.I.A. and remand them when it appears that the record does not reflect the current country conditions. *Id.*

<sup>194</sup> *Id.* at 317.

facing courts dealing with aliens and deportation. The Convention's purpose, which is to recognize that "the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world"<sup>195</sup> can be furthered when courts take into account the current and realistic conditions in the alien's home country. *Berishaj* makes clear that concerns about outdated records do not apply in all cases, such as in countries where conditions have not changed for many years or in those countries in which events happen so often that it is impossible to "hope for perfect, up-to-date decisions."<sup>196</sup> Still, it would be helpful for judges in all cases to carefully consider the current country conditions in order to better assess the alien's fears of torture. This is especially important in those cases in which potentially harsh consequences could come as a result of removal.<sup>197</sup>

## V. Conclusion

The Third Circuit's focus on consideration of the most current country conditions in Iran may help to strengthen the Convention Against Torture and allow the fairest and most accurate assessment of claims regarding aliens facing deportation. When courts adequately consider country conditions, they are able to assess the alien's fears of torture in the most accurate manner. This is especially important because the consequences of the I.J./B.I.A. decision and any subsequent decision of the reviewing court have an immediate and significant effect on the alien's life. *Berishaj* also provides a good example of a court's realization of the need to address the problem with stale records, especially when aliens facing deportation may face harsh consequences if forced to return home. Both *Ghaziaskar* and *Berishaj* highlight the need to establish the correct outcome in alien deportation proceedings to ensure that the Convention adequately protects those facing possible torture.

In removal proceedings involving claims under the Convention, courts should follow the lead of *Ghaziaskar* and more seriously consider the threat of torture and human rights violations

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<sup>195</sup> Convention Against Torture, *supra* note 7, at pmbl.

<sup>196</sup> *Berishaj*, 378 F.3d at 330, *supra* note 187.

<sup>197</sup> *See id.* at 329.

in light of the current political climate. Aliens must still concretely demonstrate the threat of torture under the Convention's narrow definition, and the threat of torture is not something that courts should take lightly. It is also necessary to take into account an alien's involvement in activities while in the United States. The Convention makes clear that it is only concerned with that torture which constitutes "an extreme form of cruel and inhuman treatment"<sup>198</sup> and must be specifically directed against a particular person.<sup>199</sup> This is a high bar to meet and will likely keep a significant number of aliens from being granted relief under the Convention. However, this also shows that the Convention was intended to protect those in the gravest danger. Judges have a duty to take these claims seriously, and this includes an adequate consideration of conditions in the alien's home country.

Recent news articles further demonstrate that instances of torture can still be found throughout Iran.<sup>200</sup> For policy reasons, the U.S. courts should not take these cases lightly, and as in *Ghaziaskar*, judges should adequately consider an alien's fears of torture against the backdrop of the current conditions in the alien's home country. All these considerations are necessary in order for the Convention to achieve its mission of recognizing the equal rights of all humans.

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<sup>198</sup> 8 C.F.R. § 208.18(a)(2) (2011).

<sup>199</sup> *Id.* at § 208.18(a)(5).

<sup>200</sup> See, e.g., Fletcher, *supra* note 2; see also Slackman, *supra* note 1.

